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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(CRL) 1503/2018 & Crl. M.A.No. 9271/2018**

HABIB ULLAH SHAIDA Petitioner
Through Mr. Sulaiman Mohd. Khan for
Mr. Habib Ullah Shaida, Advocates
versus

UNION OF INDIA & ORS Respondents
Through Mr. Vikram Jetly, CGSC for
Respondents No.1 & 2/UOI
Mr.Chaitanya Gosain for Mr. Rahul Mehra,
Standing Counsel (Crl.) with SI Pawan
Kumar &Inspector Yogeshwar, P.S.Kalkaji
Mr. Prince Wadhwa for Ms. Saahila Lamba,
Advocate for Respondent No.4

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VINOD GOEL

ORDER
% **09.08.2018**

1. The Petitioner, an Afghan national holding a German passport, has filed this writ petition seeking a writ of habeas corpus for the production of his wife (Respondent No.4) and their two children.

2. The Petitioner states that his marriage with Respondent NO.4 was performed in Kabul, Afghanistan on 14th August 2008. The first child was born to them on 2nd July 2009. The second child was born on 4th January 2014. The Petitioner, Respondent No.4 and the two children arrived in Delhi on 18th February 2017 through Ariana Afghan

Airlines on a "Tourist Visa" valid from 3rd February, 2017 to 2nd August 2017. According to the Petitioner, they were staying in a flat in Kalkaji owned by one of his friends. On 8th March 2017 Respondent No.4 went out to the nearby park with the children and did not return. Pursuant to a complaint filed by him with the police, Respondent No.4 appeared at Police Station (PS) Kalkaji on 24th March 2017 but declined to return to him with the children.

3. The Petitioner subsequently learnt that on her request, the United Nations High Commission for Refugees (UNHCR) issued Respondent No. 4 an interim refugee status till 18th April 2017. The petition then narrates how the Petitioner then repeatedly approached the UNHCR, the Ministry of External Affairs, this Court and the Supreme Court but was unsuccessful in obtaining relief. The Petitioner filed a complaint with the SHO of PS Kalkaji on 21st March 2018 apprehensive of the safe custody of his children and sought that they be handed over to him. Thereafter, the present petition was filed.

4. On 17th May 2018, this Court passed the following order in the present petition:

"2. Notice. Learned counsel for the Respondents accept notice.

3. Mr. Rahul Mehra, learned Standing Counsel appearing on behalf of the State, informs the Court that Respondent No.4, i.e. the wife of the Petitioner, and their two children, i.e. Master Shazada Iman Shaida and Master Ahmad Junaid Shaida, are with her in the refugee camp.

The status report filed by Inspector Ved Prakash, Station House Officer ('SHO') of PS Kalkaji states inter alia that the United Nations High Commission for Refugees (UNHCR) has by a letter dated 23rd April 2018, informed that Respondent No.4 and her two children have been recognized as refugees under the mandate of the UNHCR and their refugee ID cards are valid up until 12th April 2019.

4. In that view of the matter, the question of any apprehension regarding the safety of Respondent No.4 and their two children does not arise. The prayer of the Petitioner to direct the UNHCR to decline the request of Respondent No.4 for refugee status has been rendered infructuous in view of the above development.

5. Learned counsel for the Petitioner submits that notwithstanding the above development, the Court has to examine his plea that the children were taken away by Respondent No.4 unlawfully and the best interests of the children require their being returned to the Petitioner, who is an Afghan national and a resident of Kabul.

6. The Court requests the Secretary, Delhi High Court Legal Services Committee ('DHCLSC') to immediately assign a lawyer to Respondent No.4 in the present petition. A complete set of paper book be provided to the Secretary, DHCLSC. As far as service of notice upon Respondent No.4, it will be effected through the SHO concerned upon the filing of process fee by the Petitioner. The Secretary, DHCLSC will contact Respondent No.4 and provide her the details of the lawyer being assigned to her to facilitate her meeting with the lawyer so assigned.

7. Respondent No.4 will remain present with the two children in the Court on the next date of hearing.

8. List on 24th May 2018.

9. A copy of this order be delivered forthwith to the Member Secretary, DHCLSC for compliance."

5. Thereafter on 24th May 2018, the following order was passed:

"1. Respondent No.4 is present in Court. She is represented by Ms. Saahila Lamba, Advocate. The Court is of the view that the Petitioner and Respondent No.4 should make an attempt to resolve their disputes through mediation in the first instance. It is also important that the Petitioner is able to meet the children for a while at the mediation centre.

2. It is accordingly directed that the Petitioner, the Respondent No.4 and their two children will be present at Delhi High Court Mediation and Conciliation Centre ('DHCMCC') at 3:30 pm on 25th May 2018.

3. The Secretary DHCMCC is requested to assign a senior mediator.

4. The report of the mediation be placed before the Court on the next date of hearing.

5. List on 28th May 2018. A copy of this order be delivered to the Secretary, DHCMCC forthwith."

6. On 28th May 2018, this Court passed the following order:

"1. The mediation report has been submitted stating that no settlement was possible.

2. We met Respondent No.4 with her two children in the chamber. She is not inclined to accept the offer of the Petitioner of taking her and the two children to Germany with an assurance that there will be no harm to any of

them. She is, in fact, categorical that she does not wish to go with the Petitioner to Germany.

3. Learned counsel for the Petitioner prays that before he leaves, and soon before the next date, he may be allowed to meet the children.

4. The Court directs that the Respondent No.4 will bring the two children to the Delhi High Court Mediation and Conciliation Centre (DHCMCC) on 29th May 2018 at 3 pm where the Petitioner can meet his children for two hours in the presence of Respondent No.4. Likewise she will bring the two children to the DHCMCC on 6th August 2018 at 3:00 pm when again the Petitioner is permitted to meet the children for two hours in her presence.

5. List on 9th August 2018."

7. Pursuant to the orders passed by this Court on 28th May, 2018 the two children (both male aged nine and five years respectively) have met their father i.e. Petitioner at the Delhi High Court Mediation and Conciliation Centre ('DHCMCC').

8. It is not in dispute that the children have been reluctant to meet their father. Even today Respondent No.4, the wife of the Petitioner is unwilling to return with the Petitioner notwithstanding the assurance given to this Court by Petitioner which was recorded in para 2 of the previous order dated 28th May, 2018.

9. The Court has also examined the judgments of the Supreme Court in *Nithya Anand Raghvan v. State (NCT of Delhi) (2017) 8 SCC 454*

and *Mrs. Kanika Goel v. State of Delhi through SHO 2018 (9)*

SCALE 62. In the last mentioned judgment it is being reiterated by the Supreme Court in para 23 as under:

“As expounded in the recent decisions of this Court, the issue ought not to be decided on the basis of rights of the parties claiming custody of the minor child but the focus should constantly remain on whether the factum of best interest of the minor child is to return to the native country or otherwise. The fact that the minor child will have better prospects upon return to his/her native country, may be a relevant aspect in a substantive proceedings for grant of custody of the minor child but not decisive to examine the threshold issues in a habeas corpus petition. For the purpose of habeas corpus petition, the Court ought to focus on the obtaining circumstances of the minor child having been removed from the native country and taken to a place to encounter alien environment, language, custom etc. interfering with his/her overall growth and grooming and whether continuance there will be harmful. This has been the consistent view of this Court as restated in the recent three Judge Bench decision in *Nithya Anand Raghavan* (supra), and the two-Judge Bench decision in *Prateek Gupta* (supra). It is unnecessary to multiply other decisions on the same aspect.”

10. In the present case, the children of the Petitioner and Respondent No.4 have remained in India for well over a year in the custody of their mother. The children have expressed their reluctance even to meet their father. Their mother, Respondent No.4 has sought and obtained refugee status for herself and the two children under the mandate of the UNHCR and their refugee ID cards are valid up until 12th April 2019. There is nothing on record to indicate that there is any threat to the safety and security of the children or that they are in

any way inconvenienced or their overall development harmed during their stay in this country. Consequently, the Court has no hesitation as far as the present petition is concerned in declining the relief sought for by the Petitioner.

11. Counsel for the Petitioner seeks an order regarding the visitation rights of the father as and when he visits India. Counsel for Respondent No.4 on instructions categorically states that the children are disinclined to meet their father. Therefore, it is not possible for the Court at this stage to issue any omnibus order regarding the visitation rights of the father. He may seek such relief in other appropriate proceedings that may be available to him in law.

12. The petition and the application are dismissed with the above observations.

13. Order *dasti* to the parties under the signatures of Court Master.

S.MURALIDHAR, J.

VINOD GOEL, J.

AUGUST 09, 2018

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